No. 2513.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN H. MUSTARD, SAM J. TAGGART and FRED AYER,

Appellants,

vs.

E. C. ELWOOD,

Appellee.

BRIEF FOR APPELLANTS.

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FRANK D. MONCKTON, Clerk.

By ....., Deputy Clerk.

THE JAMES H. BARRY COMPANY
SAN FRANCISCO

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STATEMENT OF THE CASE.

This is an action brought by a member of an unincorporated social club, or society, organized and existing in the City of Nome, Alaska, known as the "ENI" Club, to enjoin the officers of said Club from disposing of or distributing intoxicating liquors to members in said Club without a retail or bar-room license.

The defendants demurred (Tr., 9) to the amended

complaint (Tr., 3) on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and defendants elected to stand on the demurrer. Judgment (Tr., 64) was entered against them and from this judgment they appeal.

The lower court adopted as its opinion (Tr., 11) the brief of the United States Attorney and his assistant, who appeared as *amici curiae*.

The facts are so succinctly stated in the Amended Complaint (Tr., 3) that we refrain from further restating them here.

SPECIFICATION OF ERRORS.

1. The Court erred in overruling the demurrer of the defendants John H. Mustard, Sam J. Taggart and Fred Ayer to the Amended Complaint herein.

2. The Court erred in filing and entering its final judgment and decree in said action in behalf of said plaintiff and against the defendants over the objections of defendants.

ARGUMENT.

Under the issue the defendants urge the following propositions:

1. That in Alaska it is only the sales of intoxicating liquors as a business that require a license.

2. That the manner and form in which intoxi-

cating liquors are disposed of in said Club do not constitute a sale thereof within the meaning of Section 2571 or 2581, Compiled Statutes of Alaska.

3. That neither the defendants nor the Club are engaged in, or conducting, a retail liquor business, or bar-room, within the meaning of the license laws of the District of Alaska.

HISTORY OF ALASKA LIQUOR LEGISLATION.

As to the history of liquor legislation for Alaska, it may be observed that the importation and sale of intoxicating liquors was, by the Act of May 17th, 1884 (23 Stats., 24, 28) prohibited, except for certain specified purposes.

By Section 1955 of the U. S. Revised Statutes the President was given power to regulate the importation and use of intoxicating liquors.

By executive order of May 4th, 1887, the importation of intoxicating liquors in Alaska was regulated.

By executive order of March 12th, 1892, the sale of intoxicating liquors for certain purposes could be made by persons who obtained a special permit from the Governor.

By the Penal Code of March 3rd, 1899 (30 Stat., 1253) as amended and now embraced in the Compiled Statutes, Sec. 2571, etc., the above statutes and orders *were repealed.*

Endelman v. *U. S.,* 86 Fed., 456.

Sec. 2569 of the Compiled Laws of Alaska now provides for licensing certain *"lines of business."*

Sec. 2571 and following provide the time, place, manner and conditions for licensing the *wholesale and retail* liquor business, manner of conducting same; and penalties for "engaging in the sale of intoxicating liquors *as specified"* (wholesale or retail) without a license; and also penalties for engaging in such sale in "dry" territory, or in a portion of the district in which the sale shall have been prohibited.

THE LAW WILL BE STRICTLY CONSTRUED IN FAVOR OF THE PARTY SOUGHT TO BE CHARGED.

In view of the conflict of the authorities, and before reviewing the cases, we will treat the questions involved as original, and new propositions in Alaska, and attempt to construe its special statutes guided by well-settled rules of construction. Among such rules are the following:

(1) The statute being penal in its nature, must be strictly construed. (2) It must be construed as a whole. (3) It must be construed with reference to the purposes and objects intended, and in the light of the history of the legislation. (4) A penal statute which creates a new crime and prescribes a punishment for it, must clearly state the *persons* and *acts denounced.* (5) The punishment prescribed must be definite and certain, and is as necessary as the definition of the crime itself. Without the penalty clause the

statute is nugatory. (6) Where general words follow the enumeration of particular classes of persons or of acts, the general words should be construed to apply to persons or acts of the same general nature or class as those enumerated. (7) It is an established rule of the Federal courts that the contemporaneous construction given to an act of Congress by the executive officers charged with its enforcement, though not controlling, is entitled to great weight.

The case of *First National Bank of Anamoose* v. *United States,* 206 Fed., 374 (C. C. A., 8th Cir.), is a late case well in point on the construction of such a statute as we are here considering.

That was a case in which a bank was convicted of violating a penal statute aimed against the collection by transportation companies and others, of the purchase price of interstate C. O. D. shipments of liquor. The appellate court held that the statute created a new crime and that a bank was not clearly within the class of persons it denounced and in arriving at its conclusion placed great weight upon the construction theretofore given the act by the executive officers of the government.

It appears, in the case at bar, that the "Eni" Club has run for years, in the manner stated in the complaint, without interference by any of the Federal officials in Alaska.

That the "person, corporation or company" referred to in Section 2571 are only such persons as "engage in

the sale" as "a line of business" would appear from the context and the object and purpose of the statute. Section 2571 contains *no penalty clause* and as a prohibitory statute it has no force or vitality. The "sale" is not even declared to be a misdemeanor.

Prescribing the punishment is as necessary to constitute an act a crime, as the definition of the acts constituting the crime.

> Sec. 2111, *Comp. Laws,* Alaska;
> *People* v. *McNulty,* 93 Cal., 427;
> *Ex parte Mulligan,* 4 Wall., 119.

To give efficacy therefore to Section 2571, except as a preamble, it would become necessary to claim the penalties provided for in Section 2581 relate to persons and acts mentioned in Section 2571. The penalties therein prescribed do not refer to any person, company or corporation who "shall sell," etc., but only to anyone "engaging in the sale of intoxicating liquors, *as specified in this act*" (that is at wholesale or retail), and "who are *required by it* to have a license" (that is those doing business), and who have no license: and to "any person who shall *engage in* such sale" (that is at wholesale or retail as a business) where the sale thereof is prohibited, to-wit: some "portion of the district."

Nor is the punishment prescribed in Section 2581 certain. The place of imprisonment is not mentioned. For aught that appears the crime *intended* may have

been a felony. Judge Gunnison in *U. S.* v. *Folsom,* 3 Alaska, 226, 229, says: The statute crime "does not fall within the clearly defined lines of either a felony or a misdemeanor." Is it for the Court to declare it *either?*

The logical and common sense view and interpretation of the words "person, corporation and company" in Section 2571 is to refer them to the *class of persons* mentioned in Sections 2569 and 2581, and this brings us within the rule enunciated in the case of *First National Bank* v. *United States,* 206 Fed., 374, to-wit:

> "Where general words follow the enumeration of particular classes of persons or of acts, the general words should be construed to apply to persons or acts of the same general nature or class as those enumerated; a rule that is especially applicable to statutes defining crimes and regulating their punishment."

Again would it not seem absurd to hold that if a statute prohibited *all* sales whatsoever by any person whatsoever, unless licensed, that it should be found necessary to provide a penalty for a sale in prohibited territory?

And why should it be found necessary to prohibit sales to Indians if all sales, except licensed sales, were prohibited? Licensed persons are also prohibited from selling liquors, not only to Indians, but also to minors, intoxicated persons and habitual drunkards.

But it will be urged that the Log-Cabin-Club conducts a bar or a barroom, and that the Statute Sec.

2577 raises certain presumptions as to what constitutes a barroom, and that under such presumptions the Club *prima facie* maintains a barroom within the license laws.

Congress in defining a barroom makes a place with "means and appliances for carrying on *the business* of dispensing," etc., *prima facie* a barroom. If not *in fact* a place *of business,* it would seem that the presumption should fall.

The fact that it was thought necessary to define a barroom, at all, shows that it *was not every barroom* that came within the meaning of the statute, and the definition attempted was one to bring the term within the rule of *ejusdem generis*—a public place such as "Hotel," "Tavern" or "Boat"—the places mentioned.

CONGRESS DID NOT INTEND THAT BONA FIDE SOCIAL CLUBS SHOULD PAY A LIQUOR LICENSE IN ALASKA.

It must be taken for granted that Congress knew the confusion (Tr., 14) into which the rights of social clubs had been put by the conflicting decisions of the courts, a condition which is referred to in almost every reported decision on the subject. With this knowledge and after the decision in *Army and Navy Club* v. *District of Columbia* (Tr., 63), it enacted the law for Alaska practically in the words of the District of Columbia Act on intoxicating liquors, except the Alaska Act omitted all reference to clubs, though the District of Columbia Act specifically provided for

licensing clubs. It would seem clear that Congress did not intend social clubs in Alaska to be affected by the liquor license laws of the Territory.

For a concise statement of the conflict of opinion referred to and the weight of authority on this question, we call the Court's attention to

> *Black on Intoxicating Liquors,* Sec. 142;
> *Cuzner* v. *California Club,* 155 Cal., 303.

In the case of

> *Army and Navy Club* v. *District of Columbia,*
> 8 App. D. C., 544,

the Court, in construing the act upon which the Alaska Act was framed, decided that an incorporated social club was not exempt from the payment of a license fee fixed by the act, but it appears that the District of Columbia Act contained this provision:

> "Provided further, the said Excise Board may, in its discretion, issue a license to any duly incorporated club on the petition of the officers of the club and that the said Excise Board may, in its discretion, grant a permit to such club to sell intoxicating liquors to members and guests between such hours as the Board may designate in such permit,"

thus indicating that it was the intention of Congress in that act to include clubs among those to be regulated by the act.

It could hardly be contended that a legislature, by

any license law yet passed, intended to compel the members of a family who contributed to the common table, to pay a liquor license if wine were served; nor has it ever been decided that any such laws applied to an ordinary arrangement where several persons, other than members of a family, join in living together for economical or other reasons. It is not until some such arrangement arrives at that point where it is called a "club" that difficulties in classifying it arise. It is true, as some court has said, that there are "good" clubs and "bad" clubs. There are "clubs" which there is no doubt the license laws were intended to reach; clubs which are formed for the purpose of selling liquor without paying the license imposed on the business of selling liquors. But there are also clubs organized for social and intellectual enjoyment among members, incidentally distributing liquor to members, which it would never occur to one a legislature meant to burden with the usual business liquor license tax unless the Legislature unmistakably so expressed itself.

The view we have attempted to express is evidently shared by the courts which have rendered the latest opinions upon this subject.

In the late case of *State ex. rel. Boston Club of New Orleans* v. *Fitzpatrick,* 60 So., 691; 131 La., 1079; 43 L. R. A. (N. S.), 608 (1913), where a social club of long standing applied for a writ of mandamus to require the issuance of a license for the sale of liq-

uors without being obliged to pay the taxes or be subjected to the regulations governing barrooms, etc., the Court ordered the writ to issue and took occasion to comment as follows:

> "It is a matter partly of admission in this case and otherwise of common information that the social club now before the court and other similar organizations occupy and have for generations occupied a most prominent position in the life of this city and State; that their homes whilst usually valuable and ornamental are as innocuous to the general public, which is excluded from them, as well kept mausoleums; and as the lawmakers are as familiar with these conditions as is the community at large, it is reasonable to assume that if they had intended to impose upon the members of these organizations all the restrictions which are imposed upon persons desiring to establish barrooms, cabarets, and other places of 'business,' they would have found appropriate language in which to express their purposes."

So in the case of *State* v. *University Club,* 35 Nev., 475, 130 Pac., 468 (1913), which was an action brought by the State to recover from appellant the amount of a retail liquor license, the case presented the question of the liability of a bona fide social club, disposing of liquors to members and guests, to pay the State and county retail liquor licenses, a case almost identical with the one at bar, and the Court construed the Nevada Statute, which reads as follows:

> "On the first day of July, A. D. one thousand nine hundred and five, and annually thereafter on

January first, every person, firm, company or corporation, manufacturing or selling, either at retail or wholesale, any spirituous, malt or vinous liquors shall, in addition to the licenses now provided by law, take out a State liquor license as hereafter provided, which license shall not be transferable by sale, assignment or otherwise. . . .

"Sec. 3. The several sheriffs of the respective counties of this State are hereby made the collectors of, and authorized and required to issue and collect, said licenses, and shall, upon the payment of fifty ($50) dollars, issue a retail State license to any person, firm, company or corporation engaged in selling spirituous, malt or vinous liquors in quantities less than five gallons. . . .

"Section 121 of the General Revenue Act (Rev. Laws, Sec. 3733) provides: 'Any person or persons who may dispose of any spirituous, malt or fermented liquors or wines, in less quantities than one quart, shall, before the transaction of any such business, take out a license from the sheriff of the county in which he or she proposes to do such business, and pay therefor the sum of ten dollars per month . . . ",

and said:

"Where, as in this State, a statute imposes a license on persons engaged in the 'business' of selling liquors, the courts have universally held that bona fide social clubs are not liable to take out such a license for the reason that they are not engaged in the 'business' within the meaning of the statute" (citing a number of cases).

"The title of the act relative to State liquor licenses, the form of the license prescribed in said act and the provisions of the statute relative to the county liquor licenses specifically refer to the

'business' of disposing of liquor by retail or wholesale."

"The term 'business' as used in these statutes clearly, we think, means 'business' in a trade or commercial sense as held by the courts construing similar statutes."

"As the question is one entirely subject to legislative control, the Legislature can, if it so desires, amend the law so as to require licenses from social clubs the same as it now requires the same from persons engaged in the 'business' of selling liquor."

This case seems to be exactly in point; the facts are the same and the statutes construed almost identical, with the case at bar.

The case of

Cuzner v. *The California Club,* 155 Cal., 303,

was one brought as the one at bar by a member of the Club, a social organization of Los Angeles, to enjoin the selling or serving of liquors upon the ground that to do so would violate the provisions of a city ordinance. A demurrer to the complaint was overruled, defendant declined to answer, judgment was entered for plaintiff and defendant appealed. The case was reversed with instructions to sustain the demurrer.

The only question presented by the appeal was whether the ordinance that imposed a license tax of $100.00 per month upon "every person, firm or corporation conducting, managing or carrying on the

business of a retail liquor dealer was applicable to the defendant club."

The ordinance contained, among other provisions, the following:

> "For the purpose of this ordinance a retail liquor establishment is defined to be any place where spirituous, vinous, malt or mixed intoxicating liquors are sold, served or given away in quantities of less than five gallons, to be drunk either upon the premises or elsewhere."

The Court said (p. 309):

> "Reasonably construed, these provisions regarding liquor dealers must be held to have been intended to apply only to such persons, etc., as are engaged in the business of selling liquor in the sense in which the term 'business' is ordinarily used in that connection."

and (p. 311):

> "The term 'business' as used in a law imposing a license tax on businesses, trades, professions and callings, ordinarily means a business in the trade or commercial sense, one carried on with a view to profit or livelihood. A bona fide social club, . . in its transactions with its members in the carrying on of the club-house, looking simply to the giving to them such privileges in the property devoted to bona fide club purposes as they are all, in common, entitled to under the constitution and rules of the club, is not engaged in business at all in a commercial or trade sense, as ordinarily understood."

and (p. 316):

> "If it be deemed proper by the city of Los Angeles that bona fide social clubs engaged in the transactions of the kind here involved should pay a license tax or be in any way subjected to the operation of reasonable regulations relative to the sale or disposition of intoxicating liquors, it will be a very simple matter for it to so provide by the use of language that would clearly show such an intent."

There are many other cases to the same effect, with which we do not deem it necessary to burden this brief. Many of them are mentioned in the opinion of the trial court (Tr., 16) with the admission that they are authorities against the opinion.

Under the circumstances and the language of the Alaska License Law, it appears to us that there can be no question but the Congress plainly indicated in the Alaska law the intention to license only the "business" of selling intoxicating liquors, for in Section 2574, page 785, Comp. Laws of Alaska, we find that the application for license shall state:

> "Fourth. That said applicant intends to, and if so licensed will, carry on such *business* for himself and not as agent for any other person.
>
> "Fifth. That said applicant intends to, and if so licensed will, superintend in person the management of the *business* licensed."

In Section 2577, we find:

"Provided, That the fee for a retail license for " road-houses on regular post roads or trails where " the population within two miles of the place where " the *business* is to be conducted," etc.; and the same section thereafter three times refers to the *business* to be conducted under the license.

Section 2579 provides for examinations to be made by the authorities during *business hours.*

Section 2584 provides against licensing a person to conduct such *business* or to have such *place of business* near a school.

Section 2585 reads:

> "That all applicants who have had a license during the preceding year shall apply for a renewal of such license on or before November first of each license year and shall be permitted to *continue business* until license shall be granted or refused by the court or judge thereof," etc.

In the case of

United States v. *Jourden,* 193 Fed., 986.

this Court considered the license law of Alaska as one governing the "business" of selling liquors.

Such cases as

United States v. *Alexis Club,* 98 Fed., 725.

interpreting the United States Revenue Laws are

not in point here because the rule in Internal Revenue cases is that the United States shall be given the benefit of every doubt, while, in the State and Territorial license cases, the party sought to be charged is given the benefit of the usual strict construction of penal statutes; nor are such cases in point as those in which a club is organized for the purpose of evading the law or where a Sunday or prohibition law is violated.

In our opinion, the demurrer should have been sustained.

Respectfully submitted.

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